FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 1 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 30

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD W. HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,
Respondents.

BRIEF FOR THE STATE OF NEW YORK AS AMICUS CURIAE.

JOHN J. BENNETT, JR.,
Attorney-General of the State of New York,
Capitol, Albany, New York.

HENRY EPSTEIN,
Solicitor General,
MILTON KAPLAN,
Assistant Attorney General,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

CONTENTS.

		PAGE
1.	Statement	2
2.	History of § 124 of Decedent Estate Law	3
3.	Argument	6
	A. The Statute Is Not Unconstitutional As Repugnant To The Federal Estate Tax Law	6
	B. Section 124 Of The Decedent Estate Law Is Not Repugnant To The Supremacy Or Uniformity Clauses Of The Federal Constitution	10
4.	Other States Joining In This Brief	12

AUTHORITIES AND CASES.

Constitutional Provisions.

New York State Constitution, Article VI, Sec. 7, subd. 3 — 2
United States Constitution, Article I, Sec. 8 — 6

Statutes.

New York Civil Practice Act, Sec. 588, sub. 3 — 2
New York Decedent Estate Law, Sec. 124 — 1, 3, 4, 5, 7, 8, 9, 10, 11
New York Decedent Estate Law, Secs. 17, 18, 19, 26 — 8
New York Decedent Estate Law, Secs. 14, 38, 40, 41, 47, 125 — 9
New York Laws of 1930, Chs. 709, 710, 711 — 4, 5, 8
Federal Estate Tax Law — 2, 5, 6, 7
United States Internal Revenue Code, Secs. 826 (b) (c); 812 (d) — 2, 9
United States Revenue Act of 1924, Secs. 303 (a) (3) — 5

Cases Cited.

	PAGE
Edwards v. Slocum, 287 Fed. 651; affirmed 264 U. S. 61	5
Frew v. Bowers, 12 Fed. 2nd, 625, 628 (1926)	7
Irving Trust Co. v. Day, 314 U. S. 556, 563 (1942)	9
Matter of Bergdorf, 206 N. Y. 309, 316, 317 (1912)	10
Matter of Duryea, 277 N. Y. 310, 316	4
Matter of Vanderbilt, 281 N. Y. 297, 316	5
Peacock v. Pratt, 121 Fed. 772	10
Phillips v. Commissioner, 283 U. S. 589, 602	10
Reid v. Colorado, 187 U. S. 137	6
Sinnot v. Davenport, 22 How. 227, 243	6

Miscellaneous.

34 Columbia Law Review, 526	5
The Federalist, No. 33 (1788)	6, 7
Fordham Law Review, Vol. II, pp. 224-6	6
54 Harvard Law Review, 690	5
N. Y. U. Law Quarterly Review, March 1942, pp. 321-2	6
13 McKinney's Consolidated Laws of N. Y., p. 420	8
1 Page on Wills (1941) 53	7
1 Page on Wills (1941) 37 *et seq*	7
1 Paul, Federal Estate and Gift Taxation (1942) 774	8
U. of Chicago Law Review, April 1942, p. 528	6
Yale Law Review, Vol. 51, pp. 1202, 1208	6

Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD W. HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,
Respondents.

BRIEF OF THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE.

The Attorney General of the State of New York respectfully submits this brief as a friend of the Court, urging the reversal of the order of the Court of Appeals of the State of New York and the order entered thereon. The validity of §124 of the New York Decedent Estate Law is drawn in issue, but the concern of the State of New York represents more than anxiety for the fate of an isolated statute. The section in question is an integral factor in the New York State legislative scheme to modernize the Decedent Estate Law, repair the legal machinery for transmission of decedents' property, and eliminate inequities suffered by certain classes of dependents of unjust or shortsighted testators.

Under the New York Constitution, the Attorney General is the head of the Department of Law and, under the State Executive Law (§68) whenever the constitutionality of a New York statute is brought into question in the New York courts and an appropriate order is made, he is charged with the duty to appear therein in support of the constitutionality of such statute.

Statement.

Appellants brought this case from the Surrogate's Court to the Court of Appeals of the State by direct appeal pursuant to Article VI, §7, subd. 3 of the New York Constitution and the supplemental statute (Civil Practice Act, §588, subd. 3), which provide that a direct appeal may be taken where the only question involved is the constitutional question, and that the Court of Appeals on such appeal shall consider and determine only the constitutional question. It is therefore quite indisputable that the constitutional question was necessarily involved (See Remittitur of Court of Appeals and denial of motion to amend same).

The majority of the Court of Appeals construed §826(b) of the Internal Revenue Code as placing the ultimate incidence of the federal estate tax upon the net *residuary* estate. It then determined that the New York statute which required, in the absence of a provision in the will directing otherwise, proration of the amount of the federal tax was repugnant to said federal law, violating the supremacy and uniformity clauses of the Federal Constitution. The question of constitutionality on those two points is the sole issue on this appeal.

The Federal Estate Tax Act imposes an excise tax on the interest of a decedent which passes by reason of his

death. Congress, by that Act, has laid the tax and has provided that it shall be collected from "the executor," that is to say, from a State fiduciary rather than from any of the parties beneficially interested. Section 124 of the New York statute provides that, whenever it appears upon any accounting or other proceeding, an executor "has paid" the federal estate tax, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, shall be equitably prorated—that is to say, by the State fiduciary on his accounting, subject to the approval of the court, among the persons actually interested in the estate to whom any benefit accrues. Such right and power springs from a State's control over testamentary dispositions as well as from its control of its fiduciaries.

This question would appear to be one of nationwide importance, affecting the right of each State, through its judiciary, in the absence of a statute, to deal with the incidence of the federal estate tax after the State fiduciary "has paid" the tax and obtained his duly receipted tax bill, and, in case of a State statute, the right and power of State legislatures to enact such an act dealing with such incidence. The instant appeal involves the latter.

The History of § 124 of the Decedent Estate Law.

Section 124 was drawn by two State Commissions acting together, the State Tax Commission and the Decedent Estate Commission. The latter Commission was created in 1927 to investigate defects in the Laws of Estates. The members of the Commissions were probably the most experienced group in the State who conceivably could have been appointed to carry on the work. Among these were

included the surrogates in the four most populous counties in the State who were constantly dealing with tax questions in connection with estates; members of the State Legislature; and prominent members of the New York Bar. The work continued for a period of several years and resulted in a complete modernization of the New York statutes relating to descent and distribution and the administration and taxation of estates.

In 1929 these two Commissions undertook to reform the State inheritance tax law—to expedite their application in the light of the federal estate tax system; to provide for judicial supervision of the fiduciary upon his accounting and to enunciate a State public policy that the burden of Federal and State death taxes should follow the benefit. The Decedent Estate Commission in particular recommended (among other recommendations) that widows or surviving husbands be protected against disinheritance by unjust testators, and that certain exemptions in favor of the surviving spouse or children be increased to meet modern economic conditions.

These Commissions spent a long period of time and much care on this revision, and in 1930 presented their proposal to the Legislature. Section 124 was not an isolated act. Three important companion bills (Chs. 709, 710 and 711, Laws of 1930) were adopted by the Legislature and approved by Governor Roosevelt.

This legislation, accomplished by two outstanding State bodies, has worked satisfactorily, fairly and equitably from 1930 to 1941, and, from time to time, has had the approval of the Court of Appeals (*Matter of Duryea*, 277 N. Y. 310,

316; *Matter of Vanderbilt*, 281 N. Y. 297, 316). Referring specifically to Chapter 709 (now D. E. L. sec. 124), many citizens of New York, from 1930 to 1941 have made wills relying on § 124.

The Commissions when they drew the Act in 1929 had before them, among other factual data, the opinion of the Circuit Court of Appeals in *Edwards v. Slocum* (287 Fed. 651, affirmed, 264 U. S. 61). On the appeal to the Supreme Court distinguished counsel for the Government representing the Department of Justice and the Treasury Department expressly accepted and restated the following as "fundamental and conceded" propositions stated by Judge Hough in the Circuit Court of Appeals:

> "So far as the words of this statute are concerned, the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter."

In particular the Commissions had before them § 303(a)(3) of the Revenue Act of 1924, where Congress *expressly* confirmed the same position as to the Estate Tax Act itself.*

It is this § 124, approved by the Courts for eleven years which the Court of Appeals of New York has now suddenly and unexpectedly by a vote of four to three held to be invalid as repugnant to the Federal Estate Tax Law and as a violation of the supremacy and uniformity clauses of the Federal Constitution. And in so doing the Court of Appeals adopted a construction of the federal statute leading

* See also—34 Columbia Law Rev. 526.
54 Harvard Law Rev. 690.

to absurd, harsh and unnecessary results in disregard of this Court's settled principles of statutory construction.**

ARGUMENT.

A. The statute is not unconstitutional as repugnant to the Federal Estate Tax Law.

Alexander Hamilton pointed out in *The Federalist*, No. 33 (1788):

> "• • • it is not a mere *possibility* of inconvenience in the exercise of powers but an *immediate, constitutional* repugnancy which can by implication alienate and extinguish a pre-existing right of sovereignty." (Emphasis supplied.)

Hamilton was discussing the possibility of inconvenience in the exercise of Federal and State Governments to their concurrent power to levy and collect taxes.

This Court has said—and the principle has often been reaffirmed—"• • • repugnancy or conflict should be *direct* and *positive*, so that the two Acts *could not be reconciled or consistently* stand together." *Reid v. Colorado*, 187 U. S. 137, 148; *Sinnot v. Davenport*, 22 How. 227, 243.

The asserted repugnancy in the present case is infinitely more remote. The power conferred on the Congress is "to lay" and "to collect" (U. S. Constitution, Article I, sec. 8),

** Current comment is almost uniform in disapproval of the result and decision below:

N. Y. U. Law Quarterly Review—Mar. 1942—pp. 321-2.
U. of Chicago Law Review—April 1942—p. 528.
Yale Law Journal—Vol. 51—pp. 1202-1208.
Fordham Law Review—Vol. II—pp. 224-6.

and in this case the asserted repugnancy is between a federal statute laying an excise tax on a gross estate (including transfers by will, transfers by deed, estates in survivorship, tenancies in common and what not), and a State statute, which, by its very terms, becomes applicable only after the Federal Government has laid and collected the tax, and a fiduciary of the State "has paid" it. It is then and then only that the State statute authorizes the appropriate state courts to make sure that its own fiduciary, in his accounting as to his acts as fiduciary, shall show that he has done justice in marshalling his payments, so that, so far as possible, the burden will follow the benefit.

Not only are the Decedent Estate Law, § 124, and the Federal Estate Tax Law perfectly timed and geared for operation without friction; they also represent the exercise by the respective sovereignties in separate spheres of governmental activity of powers inherently divergent in their essential characters. The Federal Estate Law is a revenue measure designed for the purpose of providing financial means to enable the Federal Government to discharge its functions. The power over transmission of property from the dead to the living and probate of wills, traditionally reserved to the States, is entirely distinct and independent both in derivation and development. Alexander Hamilton, *The Federalist*, No. 33 (1788); 1 *Page on Wills* (1941) 53; *Frew v. Bowers*, 12 Fed. 2nd, 625, 628 (1926).

A common object of State regulation is to restrict the exercise of the power to make a will in order to protect certain classes of dependents. 1 *Page on Wills* (1941), §§ 37 *et seq.* In New York State, regulations to attain that end, as brought up to date by the 1930 reforms, include restric-

tions upon devises or bequests to charitable and other societies by persons having certain dependents; a right of election by a surviving spouse against or in the absence of a testamentary provision; a requirement that courts approve compromises in controversies relating to decedents' estates for the protection of infants, incompetents, and others; and a provision for children born after the parent's will is executed, under particular circumstances.*

Estate taxes are assuming sizeable proportions. In the computation of property passing at death the rates of the federal tax alone have sky-rocketed during the period from 1926 to 1941. The payment of the federal estate tax although in theory imposed upon the transmission of property of deceased persons, and not upon the succession of beneficiaries, "may, however, seriously affect the decedent's plans and even mutilate them beyond recognition." 1 Paul, *Federal Estate and Gift Taxation* (1942), 774. It is easily demonstrable that where the testator fails to fix the burden of estate taxes the whole program of State legislation designed to protect his dependents might be defeated by the unfortunate coincidence of the tax burden. New York State sought to remedy the situation and eliminate hardship and inequities by taking into account the important factor of estate taxes, and by enunciating a policy of having their burden follow benefit.*

A construction of the federal estate tax law in derogation of § 124 of the Decedent Estate Law—which may threaten the whole scheme of protection of dependents—can be jus-

* Decedent Estate Law, §§ 17, 18, 19 and 26, respectively.

* See the Note of the Decedent Estate Commission to Ch. 709, L. 1930, *13 McKinney's Consolidated Laws of New York*, p. 420, set out in part in Brief of Petitioner under heading "The Importance of the Question."

tified only by clear and unequivocal expression by Congress; surely not by devious and forced inference.

A regulation by Congress that the residuary estate is to meet the entire burden of federal estate taxes would be valid only if clearly related to the exercise of the federal taxing powers granted by the Constitution. That Congress had no motive for, and in fact did not intend to so regulate appears from the provisions in §812(d) and §826(b), (c) of the Internal Revenue Code which specifically leave the determination of the burden of the tax to the will of the testator. A Congressional regulation incidental to the exercise of the taxing power would almost of necessity require uniform application. Uniformity is not attained where the regulation yields to the independent judgment of the individual testator.

On the other hand, the net effect would be purely negative, serving merely to embarrass the State Legislature in the legitimate exercise of a State function. For the "will" of the testator to which the privilege of determining the incidence of the federal estate tax is addressed is not an unrestrained abstract expression by the testator, but rather a legal instrument conditioned by State Law. Sections 14, 26, 38, 40, 41, 47, and 125, as well as section 124 of the Decedent Estate Law are examples of valid conditions attached by the State to the will-making privilege. "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance." *Irving Trust Co. v. Day*, 314 U. S. 556, 563 (1942). A will can have no force or meaning except as it is construed, regulated and affected by applicable State rules upon which it depends for its exist-

ence. "A testator intends and must be deemed to intend the results which the application of those rules produce. They affect the testamentary disposition and provisions as though embodied in the will; * * *." *Matter of Bergdorf*, 206 N. Y. 309, 316, 317 (1912).

It is inconceivable that Congress would empower the testator—acting entirely by sufferance of the State—to determine the final incidence of the tax; yet reject a construction of the will to the same effect, imposed by New York State when the testator is silent. The result would be anomalous if not absurd, and, we respectfully submit, was never intended. The "dead hand" would indeed then triumph over the sovereign power.

B. Section 124 of the Decedent Estate Law is not repugnant to the supremacy or uniformity clauses of the Federal Constitution.

The requirement in the United States Constitution that federal excise taxes shall be uniform throughout the United States is not a proper ground for holding State statutes unconstitutional. *Peacock v. Pratt*, 121 Fed. 772. And the federal estate tax statute construed so as to permit the States to determine the final incidence of the tax would not infringe upon the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity. *Phillips v. Commissioner*, 283 U. S. 589, 602.

The Order of the Court of Appeals and the Order of the Surrogate's Court of New York entered thereon should be reversed and the validity of Section 124 of the Decedent Estate Law sustained.

JOHN J. BENNETT, JR.,
Attorney-General of the State of New York,
Capitol, Albany, New York.

HENRY EPSTEIN,
Solicitor-General,

MILTON KAPLAN,
Assistant Attorney General,

Of Counsel.

Other States Joining Herein.

The undersigned States, by their respective Attorneys General, do hereby join in the foregoing brief of the State of New York as *amicus curia* and urge upon this Honorable Court the contentions therein advanced.

STATE OF FLORIDA
By—
J. Tom Watson,
Attorney General.

STATE OF VERMONT
By—
Alban J. Parker,
Attorney General.

STATE OF GEORGIA
By—
Ellis Arnall,
Attorney General.

STATE OF ARKANSAS
By—
Leffel Gentry,
Attorney General.

STATE OF NEW MEXICO
By—
Edward P. Chase,
Attorney General.

STATE OF MICHIGAN,
By—
Herbert J. Rushton,
Attorney General.